United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

NO. 76-7143

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT BRICK,

Plaintiff-Appellant,

v.

CPC INTERNATIONAL, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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INDEX

AUTHORITIES CITED

Cases:

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PRELIMINARY STATEMENT

This is an appeal from an Order of the Honorable Lloyd F. MacMahon, United States District Judge, Southern District of New York.

STATEMENT OF ISSUES

1. Did the Court err or commit an abuse of discretion in denying class action status herein?

2. Did the Court err or commit an abuse of discretion in refusing to transfer this cause to the United States District Court for the District of Columbia?

STATEMENT OF THE CASE

a. Proceedings Below

This case involves a class action filed by a resident of the District of Columbia in the United States District Court for the District of Columbia. The gravamen of the case is primarily violations of the Securities Exchange Acts, involving fraudulent non-disclosures in a prospectus published by the defendant (hereinafter referred to as appellee) at the time of a public offering of stock in a wholly-owned corporation. The appellant is the purchaser of 600 shares of said stock.

Some months after the filing of this action, several other actions were filed in the United States District Court for the Southern District of New York. For the sake of clarity, the instant action shall hereinafter be referred to as the "D.C. Action" and the other subsequent suits as the "New York Actions."

When apprised of the filing of the New York actions, Judge Richey of U.S. District Court for the District of Columbia *sua sponte* transferred the D.C. action to the Southern district of New York so that it could be consolidated with the New York actions.

Thereafter, the parties in the New York actions voluntarily dismissed the class action claims of their lawsuits, and settled their individual claims with the consent of Judge MacMahon, leaving only the instant action pending before the Court.

b. Facts Relevant to Review

Upon learning of the dismissal of the class action aspects of the New York actions and the imminent settlement of the remaining claims in said actions, appellant moved for a re-transfer of this action to the District of Columbia. This motion was denied.

Thereafter the Court denied class action certification herein. Appellant's counsel thereupon informed the Court that appellant must take an appeal or else dismiss his action since it was not economically feasible for him to proceed on his individual claim.

ARGUMENT

Appellant asserts that the Court committed an abuse of discretion in denying class action certification herein. It will be observed that the basic grounds for such denial were that the plaintiff is an attorney and is the law partner of counsel herein. In addition, the Court implied that counsel was insufficiently experienced or qualified to protect the interests of the class. Appellant submits that the latter determination was not only erroneous, but was made without any foundation therefor. In this regard, appellant refers this Honorable Court to the letter in the Appendix hereto from the Chief Judge of the highest trial court of the District of Columbia. Said letter outlines counsel's experience and reputation as a trial lawyer. In addition, counsel has been authorized by the Honorable William B. Jones, Chief Judge of the United States District Court for the District of Columbia to name him to this Court as a reference as to Counsel's experience and ability as a trial lawyer. By contrast, Judge MacMahon made no effort to ascertain counsel's qualifications, but instead made a superficial determination that counsel was not fit to protect the class.

In addition, the lower Court made a further superficial determination that appellant was not a proper representative of the class by virtue of the fact that he and his counsel are law partners.

The net result of all the foregoing is that there is now no law suit whatsoever pending before the Courts which seeks to obtain justice for the large class of stockholders in the corporation involved herein, who have sustained loss as a result of the wrongful acts of the appellee.

In this regard, appellant refers this Honorable Court to *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927. In that case the U.S. Court of Appeals for the Seventh Circuit dealt with the dismissal of a class action, because of alleged misconduct of counsel. The Court of Appeals set aside the dismissal, referring among other things, to the fact that counsel had not been granted a sufficient hearing at which he could explain his conduct. More importantly, the Court pointed out that the dismissal threw the entire class out of court. The Court held, at page 932:

> "It must be remembered that what the Court is primarily concerned with here is not the interests of the named plaintiffs and their attorneys but the interests of the members of the class."

Indeed, this Honorable Court itself reversed a denial of class action certification in *Korn v. Franchard*, 456 F.2d 1206. In that case also, the lower court penalized the class because of alleged improprieties of counsel. This Court pointed out that class action status should be granted with liberality in securities litigation.

In the instant case, of course, there is no allegation of misconduct by counsel, but rather an intimation that counsel is not qualified. This is particularly ironic since counsel was recently elected by his colleagues to be the trial attorney on the issue of liability in a case which would thereafter be binding on a dozen or more different law suits involving the same occurrence. Counsel can with all modesty report that he was successful in establishing liability in said litigation.

Appellant further asserts that the lower Court's conclusion that the class would not be protected, since appellant is the partner of his counsel, is also without foundation. Appellant has informed the Court on numerous occasions that he would prosecute this cause to completion, make no effort at settlement without prior court approval, and submit all his actions herein to the careful scrutiny of the Court. Under the circumstances, it is difficult to

appreciate how the class can be better served by a dismissal of the class action aspect of this litigation.

Appellant submits, to the contrary, that the only way to protect the class involved herein is to grant class action certification so that all members of the class may be under the protection and scrutiny of the Court.

Finally, Appellant asserts that the Court below committed an abuse of discretion in refusing to re-transfer this action to the District of Columbia. It should be noted that appellant is a resident of Washington, D.C. Appellee is a Delaware corporation. This is no basis or reason for this action to be tried in New York. By contrast, the District of Columbia is the home, not only of the plaintiff, but also of the Securities Exchange Commission, whose records and files on the corporation involved herein are more readily available to the District of Columbia courts. Indeed, if filed initially in this jurisdiction, this action would properly have been subject to dismissal under the doctrine of Forum Non Conveniens. The sole reason for transfer of this action to this jurisdiction was to allow consolidation with the New York actions, thereby avoiding a multiplicity of suits. Since the New York actions have now been dismissed, there remains no rationale whatsoever for refusing to re-transfer this case to the Court where jurisdiction properly belongs.

CONCLUSION

In view of the foregoing, Appellant respectfully prays as follows:

1. That the Order of February 23, 1976, denying class action certification be reversed.

2. That this cause be remanded to the lower Court with directions to transfer the same to the United States District Court for the District of Columbia.

Respectfully submitted,

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